

DATE: December 22, 1993

CASE NO.: 93-SDW-1

IN THE MATTER OF

JOHN W. MARTIN,  
COMPLAINANT,

V.

THE DEPARTMENT OF ARMY,  
RESPONDENT.

For Complainant

For Respondent

BEFORE: THEODOR P. VON BRAND  
Administrative Law Judge

#### RECOMMENDED DECISION AND ORDER

##### Preliminary Statement

This is a proceeding under the employee protection provisions of the Safe Water Drinking Act, 42 U.S.C. § 300. John W. Martin (Complainant), a plumber employed at Ft. Jackson, a Department of the Army facility filed his complaint on May 5, 1992. The District Director issued his decision rejecting Mr. Martin's complaint on October 13, 1992. Complainant filed a timely appeal. The hearing in this case was held in Columbia, South Carolina, in the period March 8-10, 1993.

##### The Parties

###### Complainant

1. John W. Martin, the Complainant, a resident of Columbia, South Carolina, has been employed as a Wage Grade 7 plumber at Ft. Jackson, South Carolina, since September 1987. (Tr. 18-19, 23). He became involved in backflow prevention work at Ft. Jackson in February 1991. (Tr. 24).

The Department of the Army

2. Ft. Jackson, South Carolina, a facility of the Department of the Army, is subject to the regulations of the South Carolina Department of Health and Environmental Control (DHEC). (Tr. 231). Ft. Jackson, moreover, has been subject to the regulations of the Environmental Protection Agency ever since they were promulgated. (Tr. 674).

Backflows and Regulatory Requirements Pertaining Thereto

3. A backflow preventer is a device that prevents contaminants from backing into a potable water supply line. Backflows are related to the pressure in various water lines. (Tr. 21-22). Backflows are of two types: back siphonage<sup>1</sup> or back pressure.<sup>2</sup> Both may lead to contamination of water supplies. (Tr. 210-211).

4. The South Carolina State Safe Water Drinking Act (the Act) defines a cross-connection as follows:

(d) "Cross-connection" means any actual or potential connection or structural arrangement between a public water supply and any other source or system through which it is possible to introduce into any part of the potable system any used water, industrial fluid, gas or substance other than the intended potable water with which the system is supplied. Bypass arrangements, jumper connections, removable sections, swivel or changeover devices and other temporary or permanent devices through which or because of which backflow can or may occur are considered to be cross-connections.

(CX 5)

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<sup>1</sup> Back siphonage is the most common cause of backflow. For example, if a water main breaks on ground level of a multi-story building, the water at the higher level would rush to the break and vacuums or siphoning conditions would be set up all over the building. If a line were tied into a boiler or other source of contamination, such contamination would be sucked back into the water supply. (Tr. 210-211).

<sup>2</sup> Back pressure may be caused by storage tanks on high rise buildings, fire pumps, auxiliary wells with pumps, etc., where pressure can be exerted against the pressure of city water. Such situations require a backflow preventer. (Tr. 211).

The Act prohibits unprotected cross connections between a public water supply and any other water system, sewer or waste line, etc. (CX 5; Tr. 214).

5. Ft. Jackson is required to have a backflow prevention program. The regulations on backflows apply to this facility as they would to any municipality or water district. (Tr. 220).

6. The applicable State regulations define limited testers and inspector testers as follows:

Limited Tester: Shall mean any person duly certified to test any type of backflow prevention device installed in the place of his employment while he is an employee of that company, plant, hospital, etc., only.

Inspector Tester: Shall mean any person duly certified to test any devices approved for use in this state while employed as an inspector for any municipality, public water supply, or health agency. Duly certified shall mean one who has a valid state certificate indicating he has attended a course on the testing of backflow prevention equipment.

(AX 2 p. 4)

7. The State Primary Drinking Water regulations provide in pertinent part as follows:

(6) When double check valve assemblies and/or reduced pressure principal backflow prevention devices are installed to protect a public water supply against the possibility of backflow from a customer's water service, routine maintenance and testing of the devices shall be performed by a certified tester.

(a) Each device shall be tested by a certified tester after installation and before use by the customer. Each device shall be tested at least once annually by a certified tester.

(b) Each supplier of water is to receive a written report of the inspection and testing results for all devices tested within the distribution system. The report shall be submitted by the certified tester making the inspection and test.

(AX 2 p. 3) (Emphasis supplied)

Ft. Jackson Supervisors and Officials and State Officials with Backflow Prevention Responsibilities

8. Charlie R. Pittman, Jr., is a foreman in the Utilities Section, a position he has held since September 9, 1990. As foreman of the Utilities Section, he is in charge of heating, plumbing, air conditioning, small motor repair, and all maintenance on utilities. Thirty-one people work for him and he is Mr. Martin's immediate supervisor. (Tr. 496-497).

9. William Michael Munn is General Foreman, Operations and Maintenance Division. This is a branch chief position. His chief duties involve oversight over the maintenance and repair shops including the plumbing shop. He is Mr. Martin's second line supervisor. (Tr. 617).

10. Franklin D. Cooper, Jr., is Chief of the Operations and Maintenance Division at Ft. Jackson in the Directorate of Public Works, a position he has held since January 1990. (Tr. 645). He is Mr. Martin's third line supervisor. (Tr. 497-498).

11. Robert I. Smith, II, is Deputy Director of Public Works at Ft. Jackson. He is the fourth line supervisor of the plumbing shop above Messrs. Cooper, Munn and Pittman. (Tr. 431).

12. Jay Wilson is an Area Engineer with the Corps of Engineers, Savannah District Corps of Engineers Ft. Jackson. He has backflow prevention responsibilities in connection with new construction and rehabilitation of existing facilities. (Tr. 720-722).

13. James B. Knight is Chief of Environmental Management Branch in the Directorate of Public Works, Ft. Jackson, South Carolina. His primary responsibility is to ensure compliance with environmental regulations. (Tr. 740-741).

14. Major Harold Walpole is the Assistant Inspector General at Ft. Jackson. In August and September 1991 Mr. Martin submitted his concerns relating to backflows to Major Walpole. (Tr. 178-182).

15. Kelly A. Hunsucker is an official with the Department of Health and Environmental Control of the State of South Carolina (DHEC). His duties involve work with municipalities and water districts in the state with respect to backflow prevention regulations. (Tr. 209-210). He has been head of the backflow prevention program since 1977 and has been in contact with Ft. Jackson concerning backflows since 1978 or 1979. (Tr. 235-236).

#### Complainant's Involvement in Backflow Prevention at Ft. Jackson

##### John W. Martin

16. Complainant became involved in the backflow program at Ft. Jackson in February 1991, when his supervisor, Charles Pittman,

gave him a list of 130 backflows with instructions to test and designate them as passed or failed. (Tr. 24, 26; CX 1). He had at that point secured a certification as a limited tester of backflows from the South Carolina Department of Health and Environmental Control. (Tr. 24).

17. Mr. Martin states he did not have proper equipment when he began testing backflows in February 1991. (CX 2; Tr. 27).

18. According to Mr. Martin, prior to his assignment, Tom Harbort and Mike Munn had passed all backflows at Ft. Jackson. (Tr. 26-27).

19. In the period March 14, 1991 through June 1991, Mr. Martin on a number of occasions asked Mr. Pittman for information and literature on backflows. According to Complainant, Mr. Pittman on each occasion replied he did not have such materials.<sup>3</sup>

20. In mid-April 1991 Complainant asked Mr. Pittman whether he could call Mr. Hunsucker of DHEC. Mr. Martin at the time was having trouble with the backflow work. Mr. Pittman, according to Complainant, told him not to call the agency. (Tr. 30-31). Mr. Martin did call Mr. Hunsucker, who came to the post to discuss these matters. (Tr. 46).

21. Complainant in the period March 14 to mid or late April went to Mike Munn, Mr. Pittman's supervisor telling him that he was having problems and could not get answers concerning backflow preventer test procedures. Mike Munn also was unable to answer his questions. Mr. Pittman had failed the backflow test. And, neither Mike Munn or his supervisor Mr. Cooper were certified in backflow prevention. (Tr. 31-33).

22. In June 1991, after his release from the hospital, Mr. Martin informed Mr. Pittman that the list of backflows provided to him, CX 1, was incomplete and therefore it would take longer to complete the testing. Complainant found some 341 backflows on the base. More building inspections were needed to locate the additional backflows. Mr. Pittman, according to Complainant, said to go ahead. (Tr. 36-37, 47).

23. At the time that Mr. Martin was trying to locate additional backflows, Mr. Pittman gave him no help, although he was having problems on the job.<sup>4</sup> At the same time he was being "rushed

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<sup>3</sup> Complainant was away from work because of surgery in the period mid-April to June 1991. (Tr. 30).

<sup>4</sup> One example was three inch valves cutting off. He could hardly get any of them to pass or close off. Mr. Pittman claiming he had no time refused to go onsite to see the problems

over and over and over by Mr. Pittman and Mr. Munn wanting to know when I would be finished." (Tr. 38-39).

24. Complainant concluded there were many instances of non-compliance with respect to backflow and cross connection control at Ft. Jackson of the State Safe Drinking Water Act. He could not figure out why (Tr. 42-43):

I found that the new buildings were not being tested, or not being -- backflows were not being installed on the newer buildings, as required by law. The law said that any cross-connection, which is potable water tied into two lines, potable water tied into a contaminated source, the law says there shall be no cross-connection. And we had plenty of them at Ft. Jackson, and nobody was doing anything about it.

(Tr. 43)

25. According to Complainant there was no evidence that the backflows had been maintained and this delayed the work. (Tr. 48).<sup>5</sup> He saw no evidence of prior testing and there were no parts at Ft. Jackson for backflow repairs. (Tr. 49).<sup>6</sup>

26. According to Complainant, Mr. Pittman on several occasions refused to let him order parts. In July of 1991, Mike Munn gave him permission to place such orders. Mr. Martin advised Mr. Munn of his problems with Mr. Pittman in this respect. (Tr. 50-51).

27. Mr. Martin, after reading the State Safe Water Drinking Act, became convinced he would get into trouble if he did not report the backflow violations of which he had become aware. (Tr. 44).

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Mr. Martin was having. (Tr. 38-39).

<sup>5</sup> . . . what was taking so long, was they were in bad shape. There was gobs of debris real thick piled up on them, and usually, if parts have been replaced internally inside of them, that debris would not have been as thick. You would clean it out or see evidence of wrenches being turned on them or . . . When you put test fittings on them, you have to use pipe dope or Teflon tape, and there was no evidence of any of that being used to seal it, to get a good proper test from the RP tester.

(Tr. 48)

<sup>6</sup> If in testing a backflow leaks by the check which it's designed not to do, then it fails. It must then be torn down and rebuilt, but without parts that's impossible. (Tr. 53-54).

28. In June of 1991, Complainant discussed the statutory requirements concerning backflows with Mr. Pittman telling him that he and Mr. Pittman had a responsibility to make sure things were done legally or they would get into trouble. Mr. Pittman, according to Complainant, replied he had talked with the colonel who stated in effect that he did not want to make any waves. (Tr. 45).

29. In July or early August 1991 Mr. Pittman asked Complainant for a progress report on his work on the backflows. Mr. Pittman, according to Complainant, stated he wanted the backflows passed.<sup>7</sup> He also asked Complainant why he had ordered parts when he had been told not to by Mr. Pittman. When Complainant told him Mike Munn had given permission, Mr. Pittman stated that Mike Munn did not run his shop. Complainant at that point decided to go to the Inspector General to report the violations he had found. (Tr. 52).

30. Charlie Pittman called Mr. Martin on the next day complaining that Complainant was causing him a lot of paper work and that if he went over Pittman's head again, Pittman would write him up. Thereafter, Complainant in fact went to the Inspector General. (Tr. 61-62).

31. Just prior to going to the Inspector General, Mr. Martin had gone to Frank Cooper, Mike Munn's superior, complaining that Charlie Pittman refused to cooperate on backflows with respect to information or tools and that these matters should be resolved. (Tr. 60-61).

32. Complainant then went to see Major Walpole, the Assistant Inspector General (IG), at Ft. Jackson on August 28, 1991 and September 4, 1991. He told Major Walpole he had found many buildings not in compliance, that it looked like for 20 years everything had been permitted to run down and that he was having a lot of trouble with his superiors who appeared to be rushing him intentionally. (Tr. 55-56, 59).

33. In this connection, he felt that CX 1, the list of backflows, was incomplete and that his superiors should have known better. The fact that his supervisors were rushing him to complete the project and the lack of parts led him to infer that they wanted him to pass backflows not in compliance. He told Major Walpole he had been asked to falsify records. (Tr. 55-58).

34. In September or October 1991, after his visit to the Inspector General, Mr. Martin heard Pittman tell the whole plumbing shop that he should have finished with backflows before Carlos

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<sup>7</sup> To Complainant this meant either falsifying the records or to hurry through the job. (Tr. 53).

Alexander left in August 1991. (Tr. 66).<sup>8</sup> After this incident, Martin asked Pittman why he had made that statement when he knew Complainant was just getting parts at that time. According to Complainant, Mr. Pittman responded by telling Mr. Martin he would get rid of him any way he could and that Mr. Martin might as well find another job. (Tr. 67).

35. Bob Jenkins, a fellow worker, told Complainant that Pittman had told him that he would have to take Mr. Martin off backflow preventers. Mr. Pittman made this statement several times before Complainant was actually taken off backflows. (Tr. 76).

36. It was general knowledge in the plumbing shop that Mr. Martin had complained to the Inspector General. (Tr. 390-391).

37. In November 1991, Charlie Pittman again asked him about finishing up the backflow program. Mike Munn had quit rushing Complainant after the IG investigation. (Tr. 74-75). Complainant felt, however, that Mr. Pittman was rushing him continually and that the only way to comply would be to falsify the records. (Tr. 90-91).

38. Mr. Pittman, according to Complainant, at one point in March of 1992, told Mr. Martin that he wanted him to do what he was told. Complainant responded he would be glad to do so provided it was legal. (Tr. 91).

39. On November 1, 1991, Complainant had submitted a suggestion for test procedures on backflow preventers. Under the "Army Ideas for Excellence Program". (CX 7; Tr. 453). On April 29 or 30, 1992, Mr. Pittman returned it to Mr. Martin for evaluation, although the person submitted a suggestion is not supposed to evaluate it.<sup>9</sup> (Tr. 69, 71-72; CX 8). Complainant, feeling it inappropriate to evaluate his own suggestion, resubmitted it to Resource Management. (Tr. 72-73). The suggestion still has not been evaluated. Such delays by DPW due to inefficiency occur regularly. (Campbell 474-475, 479).

40. Complainant had made two additional suggestions concerning backflows in April 1992 (CX 22, CX 23) to the Director of Resource Management. He made these suggestions out of his concern for health and safety, knowing there were violations to be corrected. The suggestions were turned down as already under consideration.

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<sup>8</sup> Alexander had been detailed to help Complainant on the project.

<sup>9</sup> Supervisors as a general rule do not know who the suggester is. It is possible a supervisor could unknowingly give a suggestion to the suggester for evaluation. (Campbell 473-474).



(Tr. 97-99). Less than 5 percent of the DEH suggestions are adopted. (Campbell 475).

41. Bob Smith, then Division Chief for the Design and Engineering Branch, according to Complainant, stated that Mr. Martin's supervisor wanted to take him off backflows but that he, Smith, had talked them out of it. This was within a month of Complainant going to the Inspector General. (Tr. 77-78).

42. In early 1992, Mr. Martin took and passed a test to be certified as an inspector-tester in February 1992. (Tr. 78-79). CX 9 is a copy of the certificate of the license he received for inspecting backflow preventers. It was issued March 4, 1992. (Tr. 79).

43. Complainant conceived of his inspector job as follows:

To go in and find -- at that time, go in and find backflow valves that were not there, and keep records of them. Actually, coordinate a backflow and cross-connection control program; put it together for the -- for Ft. Jackson, which never really had one before; design and lay out proper installation methods to be more cost effective to on-the-job installation when we were having to install them and go behind contractors that had not installed them during that time frame, which I was doing. Correcting some risk violations that needed to be corrected.

(Tr. 79-80)

4. Mr. Pittman in early March 1992 told Complainant that he had no authority to give advice or to make decisions on anything. Martin had informed Pittman they could get into trouble for letting law violations happen. Mike Munn told him at that time that the general would not tolerate any Wage Grade 7 telling management what to do. (Tr. 85).

45. In late March of 1992, Complainant was assigned to work with J. B. Knight, the Environmental Branch Engineer Chief. (Tr. 91). In view of the complaint to the IG, the IG required answers, and in this connection Martin was assigned to J. B. Knight. Claimant informed DHEC and a meeting with J. B. Knight, Jay Wilson and Hunsucker was set up. According to Complainant, Hunsucker told J. B. Knight and Jay Wilson that he would leave it up to Complainant how to manage the program. (Tr. 92).

46. According to Mr. Martin, Mr. Pittman was hostile because of Martin's call to DHEC telling him not to call DHEC any more. Pittman said he would write him up for doing so if he made more calls of this nature. (Tr. 92).

47. Mr. Hunsucker told Complainant that in late April 1992 he asked Mr. Pittman how many backflows had passed, and that Pittman replied all of them. Hunsucker told Complainant this was completely impossible. Complainant then went to Pittman stating he wanted to file a complaint with the Union. (Tr. 93). Complainant also told Mr. Pittman he intended to file a complaint with the Federal Labor Relations Authority of unsafe drinking water in the work place. Pittman told Martin to go ahead. (Tr. 94).

48. On April 14, 1992, Mr. Martin wrote the following memorandum with copies to the indicated individuals:

SUBJECT: Cross Connection and Backflow Prevention

According to the 1976 Safe Drinking Water Act, any new facilities on post are required by law to have protection for actual or potential cross connections on the water service line. It is illegal to maintain or put in water service line any facilities not protected against cross connection and backflow control. Fines can reach \$10,000 per day per violation. The violations on the new maintenance facility must be corrected.

JOHN W. MARTIN  
Backflow Inspector,  
Certification #340036495  
Utilities Section, DEH

CF:  
LTC Sweigart, DEH  
LTC Troutman, Deputy DEH  
Frank Cooper, Chief, O&M DEH  
Mike Munn, Asst Chief, O&M DEH  
Charlie Pittman, Foreman, O&M DEH  
Richard MacDonald, Plumber Workleader, O&M DEH  
Jay Wilson, Corp of Engineers<sup>10</sup>

(CX 15)

49. CX 18 is a copy of the complaint that Mr. Martin filed on backflow violations with Mr. Chandler, of the Union. It is dated April 26, 1992. (CX 18; Tr. 94-95).

50. On May 5, 1992, Mr. Pittman called Mr. Martin on the two-way radio asking him where were the records pertaining to Complainant's suggestion, i.e., CX 7 and 8.<sup>11</sup> Mr. Martin informed

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<sup>10</sup> Mr. Pittman testified he did not recall seeing the memorandum. (Tr. 532).

<sup>11</sup> Mr. Pittman on the other hand stated this dispute related to a letter by DHEC requesting information on backflows.

him that he had handed them back to the Director of Resource Management. (Tr. 101). Pittman called him back to the shop and told him he was taking him off backflows before he messed up again and that he would never touch another one at Ft. Jackson. (Tr. 102). Complainant's reassignment did not affect his pay or grade.

51. Mr. Martin on the night of May 5, 1992, wrote out a complaint to the Secretary of Labor and he went back to the IG with a number of formal complaints including one against Charlie Pittman. CX 20 is the complaint against Pittman. There was also a complaint against Jay Wilson and J. B. Knight. CX 21 contains his 24 suggestions to the IG for improving the system. (Tr. 103).

52. Complainant feels he was discriminated against because he was being worked outside of his job description. He was also refused a desk audit and then was taken off a job on which he felt he was due a promotion for enforcing the Safe Drinking Water Act. (Tr. 109-110).

53. Complainant had no supervision in his efforts to locate additional backflows and cross-connections at the base. He felt going out and doing this on his own was not within the responsibility of a Wage Grade 7. According to Complainant, he was spending countless hours on the project including his own time at home because he was being rushed on the job. (Tr. 39-42).

54. According to a fellow employee in the plumbing shop, George Klingbiel, it is standard practice for everyone to be rated exceptional. Being rated less than exceptional, in the view of Mr. Klingbiel, is not up to par. (Klingbiel 429).

Charlie R. Pittman, Jr.

55. In 1990, Mr. Pittman was given instructions to repair or check backflow preventers. The workload, however, was so heavy that there was no time to work on preventers in 1990. (Tr. 504).

56. In 1991 Mr. Pittman assigned Messrs. Martin and Alexander to test and repair backflows. (Tr. 504-505). Mr. Pittman denies giving Complainant a list where backflow preventers are located. (Tr. 506). According to Mr. Pittman, he told Complainant he would assign help, if needed, but Mr. Martin never requested help. (Tr. 507).<sup>12</sup>

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(See Finding 61, infra).

<sup>12</sup> Mike Munn advised Mr. Pittman that Martin told him he needed help and Pittman would not provide it. Pittman denies this. (Tr. 507-508).

57. Mr. Pittman felt the backflow prevention work by Mr. Martin was going too slowly. Complainant had worked on the program 13 months without completing it and Mr. Pittman saw him "doing a lot of riding." Mr. Pittman felt Mr. Martin was goofing off. According to Mr. Pittman, Mr. Martin and Alexander before the latter left informed him they had completed 80 to 90 percent of the backflow preventer testing. (Tr. 513-514).

58. Complainant was assigned to non backflow prevention duties on May 5, 1992. Mr. Pittman denies knowledge before that date that Complainant had made suggestions to the Army suggestion program. (Tr. 510).

59. Mr. Pittman contends he told Martin to stop ordering parts because he still had parts on hand. (Tr. 516-517).

60. According to Mr. Pittman, he had told Complainant to do what he was told and to follow instructions concerning the work of backflow preventers. One incident involved Martin's looking for cross-connections at the hospital. Mr. Martin's job, however, according to Mr. Pittman was to check and repair backflows and not to look for cross-connections. (Tr. 519-520).<sup>13</sup> Working on cross-connections is the function of the engineers not the plumbing shop, according to Mr. Pittman. (Tr. 532).

61. The final incident, according to Mr. Pittman, deciding him to take Complainant off backflows occurred when Mike Munn asked Pittman to do a report on backflows. Mr. Pittman told Martin to give him his input and he would relay it to Munn. Three or four days later Pittman asked Complainant for the information. Mr. Martin replied that he had already turned it in. This was the final incident causing Mr. Pittman to take Complainant off backflow preventer work. (Tr. 523-525).

62. Mr. Pittman removed Mr. Martin from backflow prevention because Complainant did not go through the chain of command. (Tr. 593-594). Another reason was Martin's ordering of excess parts, there were a lot of parts in the inventory. (Tr. 606).

63. Mr. Pittman felt that Complainant was going outside the chain of command when he called Mr. Hunsucker, about coming on the post and he [Mr. Pittman] knew nothing about it. This occurred before Mr. Martin was taken off backflow work. Another instance when Complainant went outside the chain of command occurred when Mr. Martin complained to Michael Munn that Mr. Pittman was giving him no help on backflow preventers. This incident occurred also before Complainant was taken off backflows and Mr. Pittman learned of it from Mr. Munn. (Tr. 579-581; CX 41).

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<sup>13</sup> According to Mr. Pittman there was a similar incident involving the laundry which was to be torn down. (Tr. 520).

64. In Mr. Pittman's view, Complainant also went outside the chain of command in responding to a letter for DHEC concerning backflows. According to Mr. Pittman, he told Mr. Martin to provide him input so he [Pittman] could transmit the information to Mr. Munn. Mr. Pittman states that when he subsequently asked for the letter, Martin replied he had already turned over the letter in not stating to whom he had given it. (Tr. 581-582; CX 41).

65. Mr. Pittman denies knowing of Mr. Martin's complaint to the IG concerning backflow preventers before May 5, 1992, the date he took Martin off the backflow preventer program. Mr. Pittman contends he first learned of the IG complaint during the Department of Labor investigation. (Tr. 526-527).

66. Mr. Pittman denies telling Martin to pass backflow preventers as correct and operating properly when they were not or to falsify records concerning such devices. Mr. Pittman also denies telling Complainant he might as well find another job because he was going to run him off and do anything to get rid of him. (Tr. 527-528).

67. According to Mr. Pittman, he has never given Mr. Martin a bad performance evaluation. He has given other employees less than "exceptional" performance ratings. (Tr. 529).

William Michael Munn

68. In 1990, Mr. Munn was aware that Ft. Jackson was six to eight months behind in working on backflow preventers. He met with Mr. Pittman about testing and repairing these devices to insure water quality. Mr. Pittman subsequently assigned Mr. Martin to these duties. (Tr. 618).

69. Mr. Martin complained to Mr. Munn once in early 1991 that Mr. Pittman had not provided help in testing and repairing backflow preventers or the materials Mr. Martin needed in that connection. Mr. Munn discussed this with Mr. Pittman who, according to Munn, promised to provide help as needed. Mr. Munn told Complainant to order what parts he needed and make the necessary repairs. When he asked Martin how things were going, the reply was slow. (Tr. 618-619).

70. Mr. Munn denies telling Complainant to pass backflow preventers as working properly when this was not the case. Mr. Munn also denies being aware of Mr. Martin's IG complaint prior to May 5, 1992. (Tr. 620).

71. In the view of Mr. Munn, Complainant's testing and repair of backflow preventers was within the duties of a WG-7 plumber. (Tr. 620).

72. Mr. Pittman complained to Munn that Complainant had not tested or repaired all the backflow preventers that he was to work on. Pittman also complained that Martin had not used all the materials he had ordered. Mr. Pittman further complained to Mr. Munn that Martin had not followed the chain of command, informed him of Complainant's whereabouts, the maintenance he was performing or the parts he needed. (Tr. 621).

73. Mr. Munn denies telling Complainant that the General at Ft. Jackson would never allow a WG-7 to tell management what to do. (Tr. 625). According to Mr. Munn, Complainant was not running the backflow program at Ft. Jackson and neither was he. (Tr. 628).

74. Mr. Munn considers Complainant to be an average worker who does a good job. (Tr. 633).

75. The state law requires annual testing of backflow preventers. Ft. Jackson is behind schedule on such testing because of the pressure of other work. (Tr. 635).

Franklin D. Cooper, Jr.

76. Mr. Cooper denies being aware of Mr. Martin's IG complaint prior to the complaint filed in this proceeding. (Tr. 646). Mr. Cooper feels that Complainant is a good employee noting that he has gotten exceptional performance ratings. (Tr. 649-650). Mr. Cooper understood that Mr. Pittman thought that Complainant's production had dropped, and that Martin had ordered excessive materials and repair parts leaving too much inventory on the shelf. (Tr. 650-651). Mr. Cooper has no recollection of Mr. Martin complaining about Mr. Pittman. (Tr. 652).

J. B. Knight

77. Mr. Martin was detailed by Mike Munn or another foreman to get Mr. Knight a list of the buildings that did not have backflow preventers. From this list Mr. Knight drafted a contract for installation of backflow preventers. The contract, however, was not awarded because the funds were not available. (Tr. 743-744).

78. Mr. Knight went to the April 20, 1992 meeting because he wanted Mr. Hunsucker's interpretation of the regulations as to where backflow preventers were required. (Tr. 746). According to Knight, Hunsucker agreed that if there was no potential for contamination from a hazardous substance, there was no need for a backflow preventer. (Tr 752).

79. Mr. Knight is aware that state law requires annual testing of backflow preventers. He recommends that this be carried out but does not know for a fact that this has been the case. (Tr. 758).

80. CX 27 is a fact sheet pertaining to annual maintenance testing of all existing preventers. This fact sheet was prepared in response to the IG's request. It states that annual maintenance and testing of all existing backflow preventers are accomplished by certified in-house shop workers. Maintenance is performed annual on 352 backflow preventers. (Tr. 759). Mr. Knight did not try to verify this information, although he represented it was true and factual. (Tr. 761).

Kelly Hunsucker

81. In the period 1985-1988, when a Donnie Krofchick was in charge, the backflow prevention program at Ft. Jackson was making good progress in the view of Mr. Hunsucker, but the program was not completed. After Mr. Krofchick left the program it came to a standstill. (Tr. 239-241).

82. In 1991, inspections at Ft. Jackson were lax and there was no active, aggressive program of locating and eliminating potential and actual cross-connections that had meaning or direction. (Tr. 253). According to Mr. Hunsucker there were violations in 1991 of the state safe drinking water act at Ft. Jackson. (Tr. 256).

83. In 1990 or 1991 before Mr. Martin became involved, Mr. Hunsucker met with Mr. Pittman to evaluate the backflow program at Ft. Jackson. Mr. Hunsucker felt the meeting was a smoke screen. There was no concrete evidence that anything had been done. (Tr. 247-248). It was Mr. Hunsucker's impression that Mr. Pittman had lied to him about the testing performed. (Tr. 250). Around January 1991, Mr. Pittman told Mr. Hunsucker that all the backflow preventers had passed. (Tr. 315).

84. The backflow program at Ft. Jackson began to make sense and take some direction, in the opinion of Mr. Hunsucker, when Mr. Martin took over. (Tr. 239).

85. Mr. Hunsucker remembers his first contact with Mr. Martin at a backflow seminar in January or February 1992. He believed that Mr. Martin already had some backflow responsibilities, but it became clear to Mr. Hunsucker at that point that Mr. Martin was going to be involved in the program. (Tr. 252, 257-258). Mr. Hunsucker spoke with Mr. Martin four or five times after March 1992, generally about problems with testing and repair. (Tr. 265).

86. Some time after March of 1992, Mr. Hunsucker had a meeting with Messrs. J. B. Knight, Jay Wilson and Martin concerning a difference of opinion involving, among others, the Corps of Engineers as to backflow preventer requirements at the hospital. (Tr. 266-267). Mr. Martin represented the plumbing shop at the meeting. The difference of opinion was between the Corps of Engineers and Mr. Martin from the plumbing shop. (Tr. 312-313).

The Corps of Engineers in the interest of economy sought to put in internal backflow devices, while Mr. Martin in addition wanted to put a backflow preventer on the service connection meter to the building. The Corps of Engineers felt that Mr. Martin's position was overkill. (Tr. 313-314, 326).

87. On April 24, 1992 Mr. Hunsucker summarized the results of the April 20 meeting stating:

After discussing the pros and cons of both the "Internal" and "Containment" approaches, it was determined that Ft. Jackson will require protection of each offending fixture within the facility in question during the construction phase. This will likely be done by the Corps of Engineer's office. Additionally, the D.E.H. will require or install protective devices at the service connection. Given the fact that internal protection will have been accomplished during construction, there will seldom be the need for a reduced pressure backflow preventer on the incoming line to the facility. DCVA's will normally be adequate.

(CX 36)

88. Mr. Martin, after the meeting, told Mr. Hunsucker that he needed more help to get some of the Ft. Jackson buildings into compliance. (Tr. 273). Mr. Hunsucker recalls that Complainant discovered a 4-inch line at the hospital unprotected with a backflow preventer. (Tr. 283).

89. Subsequently, Mr. Hunsucker learned that Complainant had been removed from the program. Mr. Hunsucker was shocked because finally the program had come together, Martin was happy in his work and doing a "fantastic job". (Tr. 274). In Mr. Hunsucker's view, the backflow program at Ft. Jackson, after Mr. Martin's removal, again appears to be at a standstill. (Tr. 276-277).

90. In Mr. Hunsucker's experience, Ft. Jackson's attitude to backflow prevention was unique in the following respect:

The uniqueness about Ft. Jackson was a constant attitude of foot dragging and deception over the years, and just lack of interest, lack of concern. That's just what I have come up against from Day One.

(Tr. 308)

91. In the view of Mr. Hunsucker, Ft. Jackson had been aware of its backflow violations at least since 1979. He had consistently made the facility aware of such violations. There was a consistent failure to take care of such violations. In his view this could be considered willful. (Tr. 340).



92. Robert Smith, the Deputy Director of Public Works at Ft. Jackson, conceded that backflow prevention does not have a high priority on the base. (Smith 446).

The IG Investigation of Mr. Martin's Complaint  
and the Response Thereto

93. Major Walpole, the Assistant IG at Ft. Jackson recalls that the primary thrust of Mr. Martin's allegations to him in August 1991 were that his supervisors were incorrectly or inaccurately recording the status of backflow valves to DHEC. (Tr. 180-181; See also CX 28).

94. The IG subsequently sent a request to the Director of Engineering and Housing at Ft. Jackson (DEH) for a response to the complaint. (Tr. 182; CX 26, CX 30).

95. The IG requested that DEH review their compliance with the South Carolina Safe Drinking Water Act to see if in fact there was compliance:

. . . The response should address the allegation that Ft. Jackson is [not] in full compliance with DHEC's regulation and applicable federal and state law in regards to reporting backflow valve status; b) if there are noted shortcomings or areas of non-compliance, that appropriate corrective measures are in place, or state what process is being used to ensure compliance.

(Tr. 183)

DEH responded as follows:

SUBJECT: Backflow Preventers

1. PURPOSE. To provide information on the status of backflow preventers.

2. FACTS.

a. In 1986 a total of 129 permanent facilities were equipped with backflow preventers, some facilities have more than one to protect that facility from its' heat exchanger (atch 1).

b. Since 1986 all water supply systems to new facilities have backflow preventers installed. This is a requirement for all future water supply systems.

c. For postwide protection for the six water supply lines from the city of Columbia, Ft. Jackson installed a backflow preventer in each line entering the post.

d. DEH and contractors requiring make-up water for pest control tanks are required to have backflow preventers between water supply valves and receiving tanks.

e. Annual maintenance and testing of all existing backflow preventers is accomplished by certified inhouse shop workers. Maintenance is performed annually on 352 backflow preventers.

f. The Tank Hill facilities all have unidirectional pressure reducing valves. This is a single check valve system that feeds water into the boiler. SCDEHC requires a double check valve. DEH plumbing shop is correcting the systems from single check valve to double check valve. Time required for the installation of a double check valve for a one inch water supply line is approximately two hours. Time required for the installation of a backflow preventer on a three inch water supply line is eight to twelve hours. Most of the DEH plumbing time is used for maintenance and the annual testing of the existing 352 installed backflow preventers. The plumbing shop has been surveying for additional facilities that need backflow preventers.<sup>14</sup>

g. Records for maintenance and the annual testing are in the plumbing office, building 2567 for SCDEHC to inspect (see atch 2). Reports required to be sent to SCDEHC are the water quality results from samples ascertained by the Preventive Medicine Branch of MAH.

Authentication: Lieutenant Colonel Les G. Sweigart  
Date: 1 October 1991.  
(CX 27)

96. The reply was drafted by J. B. Knight. (Tr. 184). With respect to paragraph (e), Mr. Knight simply accepted the word of the plumbing shop that all the required inspections had been conducted and made no attempt to verify this information. (Tr. 760-761).

97. On October 8, 1991, Major Walpole closed the case with the following memorandum stating in pertinent part:

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<sup>14</sup> Major Walpole construed this paragraph as not claiming that Ft. Jackson was in compliance at Tank Hill but that they were attempting to get into compliance. (Tr. 194).

8 Oct 91 - Walpole: Received the DEH reply on 1 Oct 91. LTC Wages discussed the findings [sic] with Mr. Knight, DEH, and is satisfied that DEH is in full compliance with appropriate regulations and laws involving backflow valves and drinking water. I talked to Mr. Martin and informed him that I was closing the case unless he had additional information for me. He informed me that DEH is considering to some of the work put in a contract to get in compliance with the Act. Case is being closed with no further action required at this time.

(CX 32; Tr. 186)

98. The IG took no action on Mr. Martin's concerns raised after his removal from the backflow prevention program because of the pending Department of Labor investigation. (Tr. 195).

#### Complainant's Job Classification

99. The duties assigned to Complainant in the backflow prevention program were to check for, test and repair backflow preventers if necessary. (Tr. 504-505, Tr. 628-629).

100. Jobs are graded based on the requirements of the job and not on the qualifications of the individual performing the job such as a license. (Tr. 702).

101. The work assigned to Mr. Martin, i.e., testing and replacing defective backflow prevention devices are consistent with the work expected of a WG-7 plumber. (Tr. 699). The fact that Mr. Martin was required to find the location of backflow preventers in a building would not change his grade. (Tr. 702). Installing a new backflow preventer device would be putting a unit on an existing system and therefore consistent with the duties of a WG-7. (Tr. 715).

102. A WG-9 plumber would be expected to maintain, replace, repair, install complete plumbing systems as opposed to installing a portion of a system such as a backflow preventer. (Tr. 700-701, 717; AX 8).

#### Complainant's Public or Customer Relations and Resultant Effect on His Personnel Evaluation

103. Edward Hertz, a salesman employed by Easton Equipment and Chemical Company and Hydro Sander, Inc., was demonstrating sewer cleaners on the post in March 1992. Mr. Martin approached Mr. Hertz introducing himself as the backflow inspector. Complainant yelled at Mr. Hertz "You need a backflow preventer, and you can't demonstrate the equipment, you can't use the equipment." Mr. Martin threatened that he would call the MPs and have Mr. Hertz

locked up and left the class. Mr. Martin returned stating the MPs wanted Mr. Hertz's name and the identity of the company he worked for. (Tr. 197-213). Mr. Martin, who did not present his concern in a professional manner, apologized later. (Tr. 204-205).

104. At a pre-final inspection on a construction project at the post on April 14, 1992, Mr. Martin told Elton Hall, a construction representative of the Army Corps of Engineers, that the building could not be accepted. The Complainant's reason was that there was not a backflow preventer in the mechanical room. However, none was in fact required. Mr. Hall found Complainant very arrogant, loud, and boisterous. He considered Mr. Martin's behavior as very unprofessional. (Tr. 733-739).

105. In September 1992 Mr. Pittman rated Complainant as "met" in customer relations in his personnel evaluation because of the complaints of Messrs. Hertz and Hall. Because of these complaints, Mr. Pittman was unable to give Complainant an "exceptional" rating. (Tr. 537).

#### DISCUSSION

This is a proceeding under the employee protection provisions of the Safe Water Drinking Act, 42 U.S.C. § 300. John W. Martin, the Complainant, a Wage Grade 7 plumber at Ft. Jackson, South Carolina, a Department of the Army facility, alleges he was discriminated against because of water quality concerns raised within and without the agency in 1991 and 1992. Specifically, he alleges that he raised concerns with respect to the alleged violations of the State statute pertaining to backflow prevention. Simply put, backflow prevention devices are designed to prevent contaminants from entering a potable water supply line. Complainant contends that in retaliation he was relieved of his backflow prevention duties, denied a promotion consistent with the work he performed in the backflow prevention program, received a downgraded performance evaluation, and failed to get appropriate consideration of suggestions he submitted under the Army's Ideas for Excellence Program. Mr. Martin's pay and grade were not reduced by the personnel actions of which he complains.

Generally in order to establish a prima facie case under the applicable employee protection provisions of the environmental statutes, a complainant must show that he engaged in protected activity of which the respondent employer was aware and that the employee took some adverse action against him. Complainant must, moreover, present evidence sufficient to at least raise an inference that the protected activity was a likely motive for the adverse action. Dartey v. Zack Company of Chicago, Case No. 82-ERA-2 Secretary's Decision and Final Order, April 25, 1983 slip op. at 5-9.

If the employee establishes a prima facie case the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate nondiscriminatory reasons. Dartey v. Zack Company, supra. If the employer successfully rebuts the prima facie case, the employee still has an opportunity to demonstrate that the reasons proffered by the employer were not the true reasons for the employment decision. In that event, the trier of fact must decide whether or not the discriminatory reason was a more likely motivation or whether the employer's proffered explanation was worthy of credence or not. Id.

Finally, if the trier of fact decides that the employer was motivated both by illegal and legitimate reasons, then the dual motive test comes into play. Under the dual motive test, the employer in order to avoid liability has the burden of persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Id.

The Department of the Army denies that Complainant engaged in protected activity or that the supervisors responsible for the allegedly discriminatory actions were aware of protected activity on the part of Mr. Martin. In short, the issues are the following:

1. Did Complainant engage in protected activity within the meaning of the Act?

2. Was Employer aware of protected activity on the part of Complainant?

3. Was Complainant relieved of backflow prevention work and subjected to other discriminatory treatment in retaliation for protected activity or were such actions taken for legitimate nondiscriminatory reasons?

4. If Complainant was subjected to discriminatory treatment because of both illegal and legitimate business reasons, did the Employer show by a preponderance of the evidence that it would have taken such personnel actions with respect to Complainant even in the absence of the protected conduct?

5. If Complainant has demonstrated that he was subject to retaliatory action because of protected activity under the statute, to what remedy is he entitled?

Motive and intent of the Employer are central to these proceedings. Accordingly, the agency's action should be viewed against the background of its compliance with the State's regulatory requirements pertaining to backflow prevention. In this connection, the assessment of Kelly Hunsucker, an official of the

South Carolina Department of Health and Environmental Compliance (DHEC), responsible for backflow compliance is critical. He had been in contact with Ft. Jackson concerning this program since 1979. His assessment was that in the period 1985 through 1988 the Ft. Jackson program was making good progress but had not been completed when the employee in charge at that time left. At that point, in his view, the program came to a standstill. In Mr. Hunsucker's opinion, in 1991 inspections at Ft. Jackson were lax and there was no active aggressive program of locating and eliminating potential and actual cross-connections that had any meaning or direction. In his view, in 1991 there were violations of the State Safe Drinking Water Act at Ft. Jackson. Significantly, Mr. Hunsucker met with Mr. Pittman, Complainant's immediate superior, before Mr. Martin became involved with backflow compliance and Mr. Hunsucker felt that that meeting was a smoke screen, that nothing had been done and that Mr. Pittman had lied to him about the testing performed. Mr. Hunsucker felt that the backflow program at Ft. Jackson began to make sense and take some direction when Mr. Martin took over. (Findings 81-84). According to Mr. Hunsucker, Ft. Jackson had been aware of its backflow violations at least since 1979. He stated in this connection that he had consistently made the facility aware of its violations, and that there was a consistent failure to take care of such violations. He summed up stating:

The uniqueness about Ft. Jackson was a constant attitude of foot dragging and deception over the years and just lack of interest, lack of concern. That's just what I have come up against from day one.

(Findings 90-91)

The Agency's officials concede the program has low priority. (Findings 92). Mr. Martin's allegations of protected activity and resultant discrimination should be viewed against that background.

### Protected Activity

Mr. Martin's protected activity can be classified in three general categories: concerns expressed to the Inspector General of the post, concerns expressed to his superiors, and contacts with the State's Department of Environmental Control and Health.

Complainant clearly engaged in protected activity when he complained to the Inspector General in August and September of 1991 alleging essentially that Ft. Jackson was not in compliance with State regulatory requirements on backflow prevention and that he was not getting adequate cooperation from his superiors in his backflow prevention work. In this connection he also alleged to the Inspector General that compliance with pressure from his superiors to hasten the work would force him to falsify records as to the pass or fail rate of backflow prevention devices.

Complainant also asserts that his contacts with the State's Department of Environmental Control and Health were also protected. Here the record is unclear as to the specifics of Mr. Martin's contacts with the State agency. On review of his testimony and that of Mr. Hunsucker. It is not entirely certain whether he was complaining of lack of compliance or whether he was seeking advice on how he could ensure compliance with the regulations or both. The record, however, shows that there was little interest by his superiors in the program, and that Mr. Martin had difficulty getting information on how to proceed from his superiors. (Findings 19, 20, 21). His contacts with the State agency must, accordingly, be considered an attempt to ensure compliance with the applicable environmental regulations, if he did no more than to seek advice. In this context such activity must be considered as protected, particularly in view of Mr. Pittman's attempts to discourage such contacts.

Complainant's concerns expressed to his second and third line supervisors, Messrs. Munn and Cooper, that he was not receiving the necessary cooperation from his first line supervisor Mr. Pittman in connection with the backflow prevention work are indisputably protected activity. (See Findings 31, 69).

Finally, on April 14, 1992, Mr. Martin wrote the following memorandum with copies to all of his supervisors stating as follows:

SUBJECT: Cross Connection and Backflow Prevention

According to the 1976 Safe Drinking Water Act, any new facilities on post are required by law to have protection for actual or potential cross connections on the water service line. It is illegal to maintain or put in water service line any facilities not protected against cross connection and backflow control. Fines can reach \$10,000 per day per violation. The violations on the new maintenance facility must be corrected.

JOHN W. MARTIN  
Backflow Inspector,  
Certification #340036495  
Utilities Section, DEH

CF:  
LTC Sweigart, DEH  
LTC Troutman, Deputy DEH  
Frank Cooper, Chief, O&M DEH  
Mike Munn, Asst Chief, O&M DEH  
Charlie Pittman, Foreman, O&M DEH  
Richard MacDonald, Plumber Workleader, O&M DEH  
Jay Wilson, Corp of Engineers

(CX 15)

This is a protected expression of concern that Ft. Jackson was not in compliance with regulatory requirements. The record, on the basis of the contemporary document, compels the finding that Complainant's superiors were aware of this exercise of protected activity. Mr. Pittman's denial at trial that he was unaware of the memorandum is not persuasive.

Turning to Mr. Martin's complaint to the Inspector General, it is evident that despite their denials Messrs. Pittman, Cooper and Munn should have been aware of these complaints. The record shows that in the relevant period Complainant was vocal in his contacts with his superiors concerning the necessity to comply with the regulatory requirements and had complained to his superiors about lack of support for the program. Moreover, the Assistant Inspector General requested a response to Mr. Martin's complaint from J. B. Knight in charge of environmental compliance at the post. In order to respond, Mr. Knight, of necessity, had to go to the plumbing shop and its supervisor to get the necessary data. (Finding 80). At the same time there is evidence that there was general knowledge of Mr. Martin's IG complaint in the plumbing shop. (Finding 36). Under the circumstances, the record compels the inference that Complainant's supervisors were aware of his complaint to the IG.

Mr. Pittman's own testimony indicates that he was aware of Mr. Martin's contacts with DHEC concerning the backflow program.

Finally, the memorandum of April 14, 1992, complaining of the Agency's lack of compliance was distributed to all of his superiors. This memorandum transmitted within less than three weeks of his relief from backflow duties concretely documents the awareness of Mr. Martin's superiors of Complainant's activities protected under the Act in the relevant time.

The protected activity extended from 1991 and to April 1992 when Mr. Martin was removed from backflow prevention duties. As already noted, the activities included complaints to his superiors, the Agency's IG and contacts with DHEC, the State environmental agency. Complainant's superiors for the foregoing reasons were aware of Mr. Martin's protected activity. The timing of his removal from backflow duties within three weeks of his memorandum of April 14, 1992, compels the inference that he was removed because of the concerns with respect to safe water drinking regulations that he had expressed. In short, Complainant has established a prima facie case. He engaged in protected activities of which his supervisors were aware and the protected activity is the likely reason for his removal from backflow duties.

Employer in rebuttal asserts that Complainant was not removed from the backflow prevention job because of the exercise of protected activity, but rather for a number of legitimate business reasons. Essentially Employer asserts that Mr. Martin was removed for failure to follow instructions concerning the backflow



prevention work, namely, that he failed to follow instructions when he allegedly needed help by going to Mr. Munn rather than going directly to his immediate supervisor, Mr. Pittman. (Finding 72). Employer further contends that Complainant failed to follow instructions when he called Mr. Hunsucker, an official of DHEC, to the post instead of first advising Mr. Pittman. (Finding 63). Employer in addition asserts that Mr. Martin also failed to follow instructions when he did not give Mr. Pittman input as instructed with respect to a letter inquiring about backflow prevention work, but rather submitted such information to someone else without notifying Mr. Pittman. (Finding 64). Another reason asserted by Employer is that Complainant was too slow in completing the backflow prevention project and that he had ordered parts which were not needed. (Findings 57, 59).

Mr. Pittman's assertion that the Complainant was removed from the backflow prevention program at least in part for "going outside the chain of command" documents that Mr. Martin's removal was in part at least due to protected activity. By going outside the chain of command Mr. Pittman explicitly referred to the concerns expressed by Complainant to Mr. Munn, Mr. Pittman's supervisor and the contacts with Mr. Hunsucker of DHEC.<sup>15</sup>

It is evident that Complainant was removed from the backflow prevention program for both valid and illegal discriminatory reasons. The Agency, moreover, has a history of foot dragging on compliance with the backflow regulations. That history of noncompliance corroborates the finding that retaliatory intent played a role in the actions complained of.

Since both legal and illegal reasons played a part in the removal of Mr. Martin, the case must also be analyzed under the dual motive test. The question is accordingly whether Mr. Martin would have been removed from the program for insubordination even absent the protected activity. On May 5, 1992, Complainant informed Mr. Pittman that instead of returning the letter of inquiry from DHEC as instructed with his input to Mr. Pittman he had turned it over to a "higher authority" whom he did not identify. (Finding 64). This is an instance of insubordination which on its own justifies his removal from backflow duties. Such action would have been taken whether or not Mr. Martin had engaged in the protected activity documented by this record.

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<sup>15</sup> The third instance cited is when Complainant failed to return the letter previously given to him by Mr. Pittman and instead passed it on to someone else. According to Mr. Pittman, the letter was turned over to a "higher authority" unknown to him. (CX 41; Finding 64).

Mr. Martin also complains that the "highly successful" rating given him during the Department of Labor investigation was a retaliatory downgrade from his previous "exceptional" rating. In connection with that action, for the reasons already stated Complainant has also established a prima facie case. Employer in rebuttal asserts there were legitimate business reasons for the downgrade, namely, the ordering of excess parts by Complainant and Mr. Martin's verbal confrontations on the subject of backflow prevention with a salesman and a construction representative of the Army Corps of Engineers at Ft. Jackson. It is unclear on the basis of this record whether Mr. Martin in fact ordered excess parts. It is, however, indisputable that he engaged in inappropriate confrontations both with the salesman in question and with the representative of the Army Corps of Engineers. (Findings 103-104). Under the circumstances, the downgrading on the basis of poor customer relations was justified. The record compels the finding that this rating would have been made even absent the exercise of protected activity by the Complainant.

Mr. Martin also alleges that the failure to grant him an award for his suggestions under the Army Ideas for Excellence Program was discriminatory. These suggestions related to backflow prevention. The first suggestion was submitted November 1, 1991, and had not been acted on at the time of trial. However, it appears that lengthy delays in considering such suggestions are not unusual under the program. Mr. Martin's suggestions of April 15 and 22, 1992, were rejected as already under consideration. (Finding 40). The record does not clearly establish who made that decision. Moreover, on the average only 5 percent of such suggestions are accepted. (Finding 14). Under the circumstances, the record does not support the inference that Mr. Martin's suggestions were rejected because of his regulatory concerns.

Complainant also contends that the failure to promote him to a higher grade from WG-7 was discriminatory. The record shows that his assignment was to inspect and repair backflow preventers. (Findings 16, 55). These functions are within the WG-7 job description. (Finding 101). Complainant contends, however, that he should be compensated for a loss of a promotion consistent with the work he was actually doing in the backflow prevention program. The contention must be rejected. His assignment to check and repair backflow preventers are properly assigned to a WG-7, his present grade. (Finding 101). The employee protection provisions of the Act were not designed to enable an employee on his own initiative to expand his duties and then demand a promotion on that basis. This would make an employee more than whole. The failure to grant an employee a promotion for duties performed over and above those assigned cannot be regarded as discriminatory.

RECOMMENDED ORDER

It is recommended that the complaint of John W. Martin be dismissed.

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THEODOR P. VON BRAND  
Administrative Law Judge

TPvB/jbm

SERVICE SHEET

CASE NAME: JOHN W. MARTIN V. THE DEPARTMENT OF ARMY

CASE NO.: 93-SDW-1

TITLE OF DOCUMENT: RECOMMENDED DECISION AND ORDER

I hereby certify that on December 22, 1993, a copy of the foregoing document was sent to the parties and their representatives at their last known addresses listed below.

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